Supreme Court, U.S.
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No. 04-1268

In The
Supreme Court of the United States

TAMARA JEAN PARKS, individually and as Trustee for the heirs and next-of-kin of PERRY MICHAEL PARKS,

Petitioner,

v.

MICHAEL POMEROY, in his individual capacity as an officer of the Woodbury Police Department,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining the applicability of the qualified immunity defense in a police shooting case under the "second prong" of *Saucier v. Katz,* 533 U.S. 194 (2001), should courts use an objective or a subjective standard in evaluating whether a police officer had a reasonable belief that he was entitled to use deadly force?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Tamara Jean Parks, individually and as Trustee for the heirs and next of kin of Perry Michael Parks, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit Court of Appeals' opinion is reported as *Parks v. Pomeroy*, 387 F.3d 949 (8th Cir. 2004), and is reproduced in the Appendix to this Petition ("App.") at App. 1. The District Court opinion, filed March 14, 2003, is published at 2003 WL 1571587 and is reproduced at App. 20. The Eighth Circuit's denial of Plaintiff's motion for rehearing or rehearing en banc is reproduced at App. 37.

JURISDICTION

The opinion and judgment of the Eighth Circuit was entered on November 5, 2004. A timely motion for rehearing and rehearing en banc was filed on November 19, 2004. The petition for rehearing and rehearing en banc was denied on December 20, 2004. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . but upon probable cause."

STATEMENT OF THE CASE

A. Statement of Facts

On Saturday, June 3, 2000, Woodbury police officers Michael Pomeroy and Jeff Gottstein responded to a domestic call at the suburban home of petitioner Tamara Parks ("petitioner" or "Tami") and her husband Perry Parks ("Parks"). Tami and Parks had gotten into an argument, which caused Tami to call 911, telling the operator, "It's a domestic . . . my husband's drunk and getting very violent." When Tami was asked "Is it physical?," she replied "Ah, well, not yet but it's gonna get there."

Tami met Pomeroy and Gottstein at the front door of the house as they arrived. Tami testified that her husband "had calmed down right before the officers came." She told the officers that Parks was in the kitchen and that he was "loading the dishwasher and taking stuff out of the sink." When the officers entered the Parks' kitchen, Parks was standing in the corner near the sink, eating "cheesies."

Although Gottstein conceded that, at that point, "there was no reason to arrest anybody," he nonetheless told Parks that the officers were going to get him out of the house. Parks replied "No. This is my house. I didn't do

anything." Gottstein then stepped towards him, and Parks put his arms up to stop him. Gottstein then grabbed Parks by the throat and pushed him backward onto the kitchen counter. When Parks tried to stop Gottstein from choking him, a struggle ensued, during which Gottstein sprayed a large quantity of oleoresin capsicum ("OC") chemical spray at Parks' face.

As Parks flailed about the kitchen, his vision seriously impaired by OC, Gottstein pulled Parks to the ground and the two men ended up head-to-head on the kitchen floor, with Gottstein partially underneath Parks. Throughout the struggle, Pomeroy had no physical contact with Parks. As Gottstein wrestled on the floor with Parks, he yelled, "Let go of my gun. He's got my gun." Pomeroy, who was standing nearby, then pulled out his gun, approached Parks and put the gun into the back of Parks' shoulder.

After seeing the gun "stuffed into Perry's back" and hearing a "click," Tami ran up behind Parks and stood over him with her hands on his shoulders. She saw Parks' left hand on the floor. Tami told Pomeroy not to shoot. Pomeroy then told Parks "Don't go for the gun," to which Parks replied, "I'm not. I can't see." Tami saw Parks' hand "flat on the ground" at this time, as if he were "bracing himself."

Pomeroy then brought the barrel of the gun up so that it was aimed at Tami's face, causing her to scream and back away. Pomeroy shouted at Parks, "Don't reach for the gun!" Parks replied, "I can't see. I can't see." At that moment, Pomeroy observed that Gottstein had his own hand in the primary grip position on his gun. Nevertheless, Pomeroy placed the barrel of his gun against the back of Parks' shoulder and attempted to shoot him. The first

two times Pomeroy pulled the trigger, the weapon did not discharge. Each time, Pomeroy cleared the misfire and shot again. On the third attempt, Pomeroy's weapon discharged, striking Parks in the back and killing him. The total amount of time that elapsed between the officers' arrival at the house and the shooting of Parks was approximately three to four minutes.

Petitioner subsequently commenced this action in the United States District Court for the District of Minnesota. The Complaint alleged, *inter alia*, that Pomeroy's actions violated the Fourth Amendment to the United State Constitution. After discovery, Pomeroy moved for summary judgment, asserting that his actions were objectively reasonable or, in the alternative, that he was entitled to qualified immunity because he did not violate a clearly established constitutional right.

The District Court analyzed Pomeroy's summary judgment motion under the two-prong analysis set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), which requires the court to first determine whether plaintiff has stated a violation of a constitutional right and then to determine whether the right was clearly established. Addressing the first prong of this inquiry, the court acknowledged a serious factual dispute about what Parks was doing "just prior to and at the moment he was shot" and found that "a reasonable jury could find that . . . Mr. Parks did not pose an immediate threat to the safety of the officers or others." The court therefore concluded that "a reasonable jury could find such a shooting unreasonable" and that Petitioner had stated a violation of a constitutional right under the first prong of *Saucier*.

The District Court then addressed whether Pomeroy was nonetheless entitled to qualified immunity under the second prong of the *Saucier* analysis. In holding that Pomeroy was not entitled to qualified immunity for his actions, the District Court stated that "[a] reasonable police officer would have clearly been on notice in June of 2000 that . . . deadly force would be unreasonable unless there was probable cause to believe that officers or others were faced with an immediate threat of serious physical harm."[1] The District Court therefore denied Pomeroy's summary judgment motion. Pomeroy then sought interlocutory appeal of the District Court's ruling to the Eighth Circuit Court of Appeals.

The Court of Appeals held that the District Court was warranted in assuming that Pomeroy could see that Parks' hand was not on Gottstein's gun at the time Pomeroy shot and killed Parks. The court noted that "we lack interlocutory appellate jurisdiction to review the district court's conclusion that plaintiff may be able to prove as a matter of fact that Pomeroy's use of force was not objectively reasonable. . . . Therefore, . . . we must assume that the amount of force used by Pomeroy was unreasonable." As a result, the Court of Appeals found that Petitioner had stated a constitutional violation, thereby satisfying the first prong of the *Saucier* analysis.

The Court of Appeals next turned to *Saucier*'s second prong: whether the right at issue was "clearly established" at the time of the violation. The Court noted that *Saucier*

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[1] It is well-established that an officer's decision to use deadly force is objectively reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)

requires an objective analysis, stating that the question was

> not whether plaintiff may be able to establish a constitutional violation – but, rather, whether she may be able to establish a violation of a constitutional right of which the contours were so defined at the time of the shooting that *a reasonable officer in Pomeroy's position* would have understood that what he was doing violated the law.

(emphasis added). The court then relied entirely upon *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998), in determining that Pomeroy was entitled to qualified immunity, holding:

> We cannot say that, at the moment of Parks's fatal shooting, Pomeroy reasonably should have known that what he was doing violated Parks's constitutional rights. . . . [T]he physical struggle . . . was intense, the circumstances were extremely volatile and potentially deadly, and the events were evolving rapidly. Therefore, notwithstanding plaintiff's citation of arguably contrary Fourth Amendment cases, we hold, upon *de novo* review, that – given the state of the law at the time and the particular facts of this case – Pomeroy did not violate a *clearly established* constitutional right.

Petitioner timely filed a petition for rehearing and rehearing en banc on November 19, 2004. That petition was denied on December 20, 2004.

B. The Qualified Immunity Standard

Through a series of decisions from this Court, the qualified immunity standard has evolved into its present objective legal reasonableness test. As first developed, however, qualified immunity had both objective and subjective elements. *See Wood v. Strickland*, 420 U.S. 308 (1975). Under the original test, a government official was entitled to qualified immunity so long as he did not act with malicious intent and reasonably believed that his actions were lawful.

This court first articulated the use of purely objective factors in determining qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the inquiry focused on the rights alleged to have been violated and sought to determine (1) whether those rights were "clearly established" and (2) whether "a reasonable person would have known" of those rights. By eliminating the subjective aspect and focusing on what a "reasonable person" would have known instead of what the particular defendant knew or should have known, this Court created an objective reasonableness test for qualified immunity determinations that still applies today. *Id.* at 818-19.

The qualified immunity test further evolved in *Malley v. Briggs*, 475 U.S. 335 (1986). The focus of the inquiry in *Malley* shifted from whether a reasonable officer would know of the existence of the rights to whether a reasonable officer would know the actions at issue violated those rights.

This Court again clarified the qualified immunity test in *Anderson v. Creighton*, 483 U.S. 635 (1987). *Anderson* reiterated that, while a determination of objective legal reasonableness "will often require an examination of the

information possessed" by the officer, an officer's subjective state of mind has no bearing on whether he is entitled to qualified immunity. *Anderson*, 483 U.S. at 641. The Court also held that even defendants who violate constitutional rights may avail themselves of qualified immunity if they mistakenly, but reasonably, believed their conduct to be constitutional.[2]

REASONS FOR GRANTING THE WRIT

CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S QUALIFIED IMMUNITY JURISPRUDENCE.

The Eighth Circuit's holding, if allowed to stand, will grant broader discretion to police officers to use deadly force than this Court's jurisprudence has ever previously allowed. Historically, qualified immunity has protected police officers who, acting in an objectively reasonable manner, make reasonable mistakes. The Court of Appeals improperly transformed *Saucier*'s objective standard into a subjective test by asking whether Pomeroy believed it was constitutionally permissible to shoot Parks in the back while Parks posed no imminent threat to the safety of Pomeroy or others. This transformation of the law of qualified immunity forms the basis for this petition.

[2] Scholarly commentary supports the assertion that the qualified immunity test has always been an objective test: "The objective legal reasonableness test, announced in *Harlow*, and clarified in *Anderson* and *Siegert*, remains the touchstone for qualified immunity." *The Paradox of Qualified Immunity: How a Mechanical Application of the Objective Legal Reasonableness Test Can Undermine the Goal of Qualified Immunity,* 82 Tex. L. Rev. 767, 776 (Feb. 2004).

Because the Court of Appeals' holding is an unwarranted extension of the qualified immunity doctrine and is in conflict with this Court's qualified immunity jurisprudence, petitioner seeks certiorari.

A. The Court of Appeals improperly applied the objective legal reasonableness test under the second prong of the qualified immunity analysis.

The proper procedure for analyzing qualified immunity in claims asserting Fourth Amendment violations was established in *Saucier v. Katz*, 533 U.S. 194 (2001). The Eighth Circuit deviated from *Saucier*'s objective two-prong test in its finding that Pomeroy was entitled to qualified immunity.

As discussed above, *Saucier* reaffirmed that qualified immunity analysis employs a two-part objective standard. The Court of Appeals recognized that it was bound by this court's qualified immunity caselaw. *See* App. 13-14 (citing *Saucier* and *Anderson*). The "first prong" of the *Saucier* test asks whether the facts, taken in the light most favorable to the plaintiff, show a constitutional violation. *Saucier*, 533 U.S. at 201.

In the context of Fourth Amendment excessive force claims, the court examines the objective reasonableness of an officer's alleged use of force. A court may consider whether an officer made a reasonable mistake of fact that justified the use of force.

In this case, both the District Court and the Court of Appeals concluded that petitioner met the first prong of the *Saucier* test. *See* App. 32-33 ("On the record before the Court, a reasonable jury could find that Officer Pomeroy's

actions were not objectively reasonable under the facts and circumstances to which he was presented."); App. 12-13 ("when the facts are taken in the light most favorable to the plaintiff for purposes of the 'initial inquiry' under *Saucier v. Katz*, . . . we must assume that the amount of force used by Pomeroy was unreasonable.").

Once a constitutional violation has been shown, the court must then determine whether the constitutional right was clearly established at the time of the constitutional violation. *Saucier*, 533 U.S. at 201. This inquiry focuses on "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. The District Court sought to determine "whether Officer Pomeroy was clearly on notice that a use of deadly force on an individual, without probable cause to believe that individual posed an immediate threat to officers or others, would violate the Fourth Amendment." Recognizing that Supreme Court guidance regarding the use of deadly force is clear and unequivocal, the court declared that

> a reasonable officer would have been on notice in June of 2000 that no greater force should be used in making an arrest than was reasonable under the circumstances, and that deadly force would be unreasonable unless there was probable cause to believe that officers or others were faced with an immediate threat of serious physical harm.

Therefore, the District Court properly determined that Pomeroy was not entitled to qualified immunity.

Reviewing the District Court's denial of qualified immunity, the Court of Appeals recognized that its task was to "ask whether the right was clearly established."

However, the Eighth Circuit rejected the District Court's second-prong analysis, instead analogizing to the facts of *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998).

Nelson, decided three years before *Saucier*, extended qualified immunity to an officer who shot a suspect following a struggle in which the suspect forced the officer into a closet and reached for the officer's gun. The *Nelson* court did not grant qualified immunity because "clearly established law" failed to provide guidance to the officer, but because it found the circumstances warranted the use of deadly force. It is clear that, had *Nelson* been decided after *Saucier*, the court would have declared that the claim failed under *Saucier*'s first prong, not for a lack of "clearly established law."

Because the Court of Appeals in this case was bound by the facts found by the District Court, it was limited to addressing whether Pomeroy made a "reasonable mistake of law"; i.e., whether a reasonable officer in Pomeroy's position would have been mistaken regarding the legal constraints on his conduct at the time of the shooting. Although the court accepted as true the District Court's determination that Pomeroy could see that Parks did not have his hand on Gottstein's gun when Pomeroy shot Parks, it nonetheless applied *Nelson*'s reasoning.

The Court of Appeals failed to explain, if it accepted as true that Parks was not reaching for Gottstein's gun and did not pose a deadly threat, how or why Pomeroy could have been mistaken as to whether he would be entitled to shoot Parks. Any mistake Pomeroy made as to *whether Parks posed a deadly threat* would be relevant only to a first-prong "mistake of fact" argument, which was implicitly rejected in both the Court of Appeals' and the District Court's determination that Pomeroy acted unreasonably

when he shot Parks in the back. To the extent the Court of Appeals' conclusion was based on the determination that Pomeroy mistakenly believed the law allowed him to shoot Parks in the back, such a mistake must have been purely subjective, not the objective mistake of law required by *Saucier*. Determinations regarding Pomeroy's subjective beliefs in the situation he confronted play no part in a proper second-prong analysis.

In order to find that Pomeroy made a "mistake" as to what the law required, as would be necessary for him to be entitled to qualified immunity, the court would need to determine that a reasonable officer could have mistakenly believed that in the midst of a struggle, it was constitutionally permissible to shoot an unarmed man in the back even when the officer could see that the man did not pose an imminent threat of death or serious bodily harm. The Court of Appeals erroneously concluded, under these facts, that Pomeroy did not know it was unconstitutional to shoot Parks. Because Supreme Court precedent is clear that it is unreasonable to use deadly force in the absence of an imminent threat, the Court of Appeals' conclusion necessarily took into consideration Pomeroy's subjective beliefs or otherwise reinterpreted the facts that it already acknowledged it had accepted. *Saucier* mandates an objective analysis on its second prong and any reasonable officer would have known that he could not shoot Parks under those circumstances. In light of the facts which the court acknowledged that Pomeroy knew, such a mistake of law simply cannot be found to be objectively reasonable.

B. The decision below conflicts with decisions from other circuit courts.

The correct analysis of the proper role of the "mistake of law" issue can be found in *Cowan v. Breen*, 352 F.3d 756 (2d Cir. 2003), a police shooting case in which the Second Circuit properly addressed such a defense under the objective *Saucier* standard. In *Cowan*, like this case, the court's decision hinged on the issue of whether the defendant officer had a reasonable belief that the decedent posed a significant threat of death or serious physical harm to him or others. The *Cowan* court explained:

> [I]f the analysis focuses on whether an officer made a reasonable mistake of fact that justified his conduct, what is being examined is whether there was a constitutional violation, not whether the officer is entitled to qualified immunity . . . . Whether the officer is entitled to qualified immunity is resolved by the latter part of the *Saucier* analysis, which looks at an "officer's mistake as to what the law requires."

Id. at 762 (quoting *Saucier*, 533 U.S. at 205). The *Cowan* court then rejected the officer's mistake of law defense, holding:

> But this question – whether it was reasonable for [defendant] to believe that his life or person was in danger – is the very question upon which we have found there are genuine issues of material fact. Because in this case genuine, material, factual disputes overlap both the excessive force and qualified immunity issues, summary judgment must be denied.

Id. at 764.

In this case, the Court of Appeals accepted as true the fact that Pomeroy was not mistaken about the events that were unfolding and that he knew that Parks' hand was not on Gottstein's gun at the time Pomeroy shot Parks. As such, the court found that a reasonable jury could conclude that Parks did not pose an immediate threat of death or serious bodily harm. Assuming those facts, any reasonable officer in Pomeroy's position could not possibly have been mistaken as to whether deadly force could be used. *See Tennessee v. Garner,* 471 U.S. 1 (1985). As in *Cowan*, the "genuine, material factual disputes overlap both the excessive force and qualified immunity issues."

Other post-*Saucier* police shooting cases from other circuits have properly dealt with the "reasonable belief" of the officer on the second prong of the qualified immunity analysis. For example, in *Wilkins v. Scarrott*, 350 F.3d 949 (9th Cir. 2003), two officers shot an undercover officer whom they mistook for a suspect. The *Wilkins* court held that defendants' entitlement to qualified immunity was determined solely by application of the first prong of the qualified immunity analysis because, had the officers in *Wilkins* known the identity of the victim, they could not have been reasonably mistaken as to the legality of their actions. *Id.* at 955-56. In its decision denying qualified immunity to the defendants, the court held:

> The only question for resolution is whether [the officers'] belief in the necessity of their actions was objectively reasonable. That is, was it reasonable for them not to understand that the person they were shooting was another police officer. Because the answer to that question depends on disputed issues of material fact, it is not a legal

> inquiry, but rather a question of fact best resolved by a jury.

Wilkins, 350 F.3d at 955.

In *Flores v. City of Palacios*, 381 F.3d 391 (5th Cir. 2004), the Fifth Circuit affirmed the denial of summary judgment on qualified immunity grounds to a police officer who shot a woman in a car to prevent her from driving away. The Court applied the two-part *Saucier* analysis and, under the first prong, rejected the officer's contention that he reasonably believed the plaintiff posed a danger to him. Applying the second prong of the *Saucier* analysis, the court held: "[W]hether [the officer]'s action was objectively reasonable depends on whether he reasonably believed that [plaintiff] posed a threat of imminent danger. This is a question of fact that we may not review on interlocutory appeal." *Id.* at 402.

Moreover, the Eighth Circuit has been inconsistent in its own application of the two-prong *Saucier* test. For example, in *Craighead v. Lee*, 2005 WL 36641 (8th Cir. 2005), the Court of Appeals properly recognized that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine whether it was clearly established." *Id.* at *5. Examining relevant case law, the court determined that officers were put on notice that "they may not use deadly force under circumstances in which they should know that the suspect does not present an immediate threat of serious physical injury or harm." *Id.*

In contrast to *Craighead*, the Eighth Circuit improperly co-mingled the factual and legal analyses in this case. The court recognized that it was bound by the District Court's description of the facts and agreed that, under

those facts, Pomeroy's conduct was unreasonable. However, when examining whether the law regarding excessive force was "clearly established," the court engaged in a reinterpretation of the facts found below, even though these facts were necessarily intertwined with its "second-prong" analysis. In the process, the court extended substantially greater qualified immunity protections to government actors in the Eighth Circuit than elsewhere.

The court below improperly considered Pomeroy's subjective beliefs on the second prong of its qualified immunity analysis, replacing the objective test of *Saucier* and allowing Pomeroy's subjective and mistaken belief that a deadly threat existed to prevail. *Cowan, supra,* demonstrates that the mistake issue regarding the level of threat posed by Pomeroy should properly have been considered a "mistake of fact" determination, relevant only to the first prong of *Saucier's* analysis.

CONCLUSION

For the reasons cited herein, Petitioner respectfully requests that this court grant certiorari to the United States Court of Appeals, Eighth Circuit.

Respectfully submitted,

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APPENDIX

387 F.3d 949

United States Court of Appeals,
Eighth Circuit.
Tamara Jean PARKS, individually and
as Trustee for the heirs and next of
kin of Perry Michael Parks, Appellee,
v.
Michael POMEROY, in his individual capacity
as an officer of the Woodbury Police Department,
Appellant.
Jeff Gottstein, in his individual capacity as
an officer of the Woodbury Police Department;
City of Woodbury, Defendants.
No. 03-2043.

Submitted: Feb. 13, 2004.
Filed: Nov. 5, 2004.
Rehearing and Rehearing
En Banc Denied Dec. 20, 2004.

Joseph E. Flynn, argued, Lake Elmo, MN (Pierre N. Regnier, on the brief), for appellant.

Robert Bennett, argued, Minneapolis, MN (Eric Hageman, on the brief), for appellee.

Before MELLOY, McMILLIAN and COLLOTON, Circuit Judges.

MCMILLIAN, Circuit Judge.

Tamara Jean Parks ("plaintiff") brought this § 1983 civil rights action in the United States District Court for the District of Minnesota on behalf of herself and the heirs and next of kin of her deceased husband, Perry Michael Parks ("Parks") against the City of Woodbury, Minnesota, and Woodbury police officers Michael Pomeroy and Jeff Gottstein. In her complaint, plaintiff asserted a Fourth

Amendment claim, among others, alleging that Pomeroy had used objectively unreasonable force when he fatally shot Parks during a struggle between Gottstein and Parks in Parks's house after Pomeroy and Gottstein responded to plaintiff's 911 call reporting a domestic dispute. Now before this court is an interlocutory appeal from an order of the district court denying Pomeroy's motion for summary judgment based upon qualified immunity. *Parks v. Pomeroy,* No. 00-2191, 2003 WL 1571587 (D.Minn. Mar. 14, 2003) (memorandum and order) (hereinafter "slip op."). For reversal, Pomeroy argues that the district court erred in failing to hold that (1) in view of certain undisputed material facts, plaintiff cannot establish a constitutional violation as a matter of law, or (2) even if plaintiff can establish a constitutional violation, he is entitled to qualified immunity. For the reasons stated below, we reverse the district court's denial of qualified immunity and remand the case to the district court for further proceedings consistent with this opinion.

The district court had original jurisdiction based upon 28 U.S.C. §§ 1331, 1343. We have appellate jurisdiction under the collateral order doctrine. *See Johnson v. Jones,* 515 U.S. 304, 310-12, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) (citing, e.g., *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)).

The following summary of the facts is based upon plaintiff's allegations, viewed in the light most favorable to plaintiff. *See* Appellant's Appendix, Vol. I, at 56-129 (Deposition of Tamara Jean Parks). On the evening of Saturday, June 3, 2000, plaintiff and Parks went to a restaurant and bar called "Sunsets of Woodbury" ("Sunsets"),

located near their home. While at Sunsets, plaintiff had less than two beers, and Parks drank approximately three 22-ounce mugs of beer. Shortly after 9:00 p.m., while plaintiff and Parks were preparing to leave Sunsets, their 17-year-old daughter called them on their cellular phone. After the phone call, plaintiff and Parks had a disagreement, and plaintiff began giving Parks the "silent treatment." Plaintiff went to retrieve their car and, with plaintiff driving, they returned home at approximately 9:30 p.m. Shortly after they arrived home, Parks began yelling and swearing at plaintiff. Their 12-year-old daughter began crying and told Parks to stop. Parks continued yelling and slammed his hand on the kitchen counter. Plaintiff grabbed the telephone and told him that she would call the police if he did not calm down. He responded by saying something to the effect of "go ahead." She called 911. Her conversation with the 911 dispatcher included the following pertinent remarks:

> Dispatcher: 911 Emergency.
>
> Plaintiff: Can you send someone to 2704 Horseshoe Lane.
>
> Dispatcher: What's happening?
>
> Plaintiff: It's a big mess here. Uh, my husband's drunk, and he's getting very violent.
>
> Dispatcher: Okay, is it physical?
>
> Plaintiff: What?
>
> Dispatcher: Is it physical?
>
> Plaintiff: N-not- well, not yet. But it's gonna get there. My girls are here.
>
> . . . .

Plaintiff: Come get him out of here.

Dispatcher: Yep, we are.

. . . .

Dispatcher: All right. And this occurred – occurred before?

Plaintiff: Well, this is the first time I've seen him this bad.

The dispatcher instructed plaintiff to remain on the line until help arrived. Meanwhile, a call went out for officers to respond. Gottstein was the first to respond by radio. The 911 dispatcher gave him the address and the following information: "Husband/wife. Male is [drunk]. No weapons. It's not physical at this point, but it sounds like it might get there." Pomeroy also responded to the dispatcher by radio, and he received the same information. Both Gottstein and Pomeroy proceeded to the house. The dispatcher reiterated the following information to the officers: "It's a husband/wife domestic . . . the father is [drunk] . . . [a]pparently it's husband versus wife. The husband is [drunk]. Children are involved."

Gottstein and Pomeroy arrived at the house at roughly the same time, and they entered the house together. Plaintiff told them that Parks was in the kitchen. When the officers went into the kitchen, Parks had calmed down and was standing by the sink loading the dishwasher and eating a snack.[1] Gottstein said to Pomeroy:

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[1] According to Pomeroy, there were two steak knives laying on the kitchen counter close to where Parks was standing. At some point, Gottstein grabbed the knives and threw them into a nearby hallway. However, there remained on the counter a knife block containing several knives. *See* Brief for Appellant at 7.

"We're going to get you out of here." Parks responded: "No. This is my house. I didn't do anything." Gottstein lunged forward and attempted to grab Parks. Gottstein is 5'5" and weighs approximately 170 pounds. Parks was 5'11" and weighed approximately 220 pounds. As Gottstein lunged forward, Parks raised one hand and blocked Gottstein, causing Gottstein to stumbled backward. Gottstein regained his balance, grabbed Parks by the throat, and sprayed Parks several times in the face with Oleoresin Capsicum or "OC" spray (similar to mace). Parks began waving his hands in front of his face, while resisting Gottstein's efforts to gain control of him. The two ended up in a physical struggle on the kitchen floor, facing in opposite directions with Parks on top of Gottstein. Pomeroy remained close by, but at this point had not engaged in the physical struggle between Parks and Gottstein. While Gottstein and Parks were struggling on the floor, Gottstein yelled out: "I think he's going for my gun."[2] At that point, Pomeroy drew his firearm and pointed it directly into the back of Parks's right shoulder. Plaintiff, upon seeing Pomeroy draw his gun, screamed and ran over to Parks, who was on his hands and knees, on top of Gottstein. Plaintiff tried to pull Parks up by the shoulders and told Pomeroy not to shoot. She could feel the effects of the OC spray in her throat, but her eyes were not affected by it. She heard Pomeroy's gun click, but it did not discharge. Pomeroy told Parks not to go for the gun, to which Parks

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[2] According to Pomeroy, when Gottstein yelled that he thought Parks was going for his gun, Pomeroy looked over and observed Gottstein's hand on the grip of his own gun and Parks's hand partially on the grip of Gottstein's gun and partially covering Gottstein's hand. The gun, moreover, was partially withdrawn from the holster. Brief for Appellant at 11.

replied: "I'm not. I can't see." Plaintiff was on Parks's left side and could see that Parks's left hand (the one closest to Gottstein's gun) was on the floor bracing himself and not touching Gottstein's gun. She observed Pomeroy reach in between Parks and Gottstein with one hand and bring his gun upward with his other hand. Pomeroy's gun came to a location where it was pointed directly at plaintiff, causing her to scream and back away. As she was backing away, she observed Pomeroy fire his gun directly into the back of Parks's right shoulder.[3] Parks died moments later. At the moment Pomeroy shot Parks, Parks was still on his hands and knees. The total amount of time that elapsed between the officers' arrival at the house and the shooting of Parks was approximately three to four minutes.

The district court held that the facts presented at the summary judgment stage, when viewed in the light most favorable to plaintiff, could reasonably support the conclusion that Pomeroy violated Parks's Fourth Amendment rights when he fatally shot Parks. The district court reasoned:

> Viewing the record in the light most favorable to Plaintiff, a reasonable jury could find that Officer Pomeroy shot Mr. Parks despite the fact that he could see that Mr. Parks' hand was not on Officer Gottstein's firearm, and that therefore Mr. Parks did not pose an immediate threat to the safety of the officers or others.

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[3] According to Pomeroy, he twice previously attempted to shoot Parks but his gun did not discharge. Each time it malfunctioned, Pomeroy performed a so-called "malfunction drill" in which he banged the bottom of the gun magazine with his hand. The gun discharged on his third attempt to shoot Parks. *Id.* at 13.

Slip op. at 12. The district court also specifically rejected Pomeroy's argument that he reasonably relied upon Gottstein's statement: "I think he's going for my gun." The district court explained:

> This argument misses the point. Officer Pomeroy asserts that he saw Parks' hand on Officer Gottstein's firearm. Officer Pomeroy's testimony leads to the inescapable conclusion that he was in a position to see what Officer Gottstein couldn't – whether Parks was in fact attempting to acquire Officer Gottstein's firearm. Officer Pomeroy cannot rely on Officer Gottstein's belief to support his actions when he was in a better position to assess the situation.

Id. at 13. Thus, the district court concluded that Pomeroy was not entitled to judgment as a matter of law on the merits of plaintiff's Fourth Amendment claim.

On the separate question of whether Pomeroy was nevertheless entitled to qualified immunity because plaintiff could not establish a violation of a "clearly established" right, the district court reasoned that, at the time of the events in question, a reasonable police officer would have been clearly on notice that no greater force may be used in making an arrest than is reasonable under the circumstances and, more specifically, that deadly force is unreasonable unless there is "probable cause to believe that officers or others [are] faced with an immediate threat of serious physical harm." *Id.* at 14-15 (citing *Nelson v. County of Wright,* 162 F.3d 986 (8th Cir.1998)). The district court noted: "As explained above, a reasonable jury could conclude that Officer Pomeroy shot [Parks] despite the fact that [Parks] did not pose an immediate threat to the officers or to others." *Id.* at 14. The district

court concluded: "Plaintiff has identified specific evidence in the record which would allow a jury to find that Officer Pomeroy's conduct was not objectively reasonable and violated [Parks]'s clearly established Fourth Amendment rights." *Id.* at 16-17. The district court thus held that Pomeroy was not entitled to qualified immunity on summary judgment. This appeal followed.

As a threshold matter, we note that, prior to the submission of the parties' briefs on appeal, plaintiff filed a motion to dismiss Pomeroy's interlocutory appeal for lack of appellate jurisdiction. We summarily denied the motion and ordered the briefing to proceed. *See Parks v. Pomeroy,* No. 03-2043 (8th Cir. May 27, 2003) (order). As indicated above, our jurisdiction over Pomeroy's interlocutory appeal is proper under the collateral order doctrine, although it is limited. To begin, we must assume the truth of plaintiff's allegations, viewing those allegations in the light most favorable to her claim of injury. *See Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). We may not assume any fact asserted by Pomeroy which the district court has deemed to be genuinely disputed, nor may we question at this point whether the dispute is truly genuine. *Johnson v. Jones,* 515 U.S. at 313-19, 115 S.Ct. 2151; *see also Moore v. Duffy,* 255 F.3d 543 (8th Cir.2001) (dismissing appeal for lack of interlocutory appellate jurisdiction under *Johnson v. Jones*). On that basis, we must decide whether the facts viewed in the light most favorable to plaintiff can establish a constitutional violation. *Saucier v. Katz,* 533 U.S. at 201, 121 S.Ct. 2151 ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do

the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry.").

If the facts alleged, viewed in the light most favorable to plaintiff, cannot establish a constitutional violation, judgment for Pomeroy is required. If, however, a constitutional violation can be established by plaintiff's allegations, we must further decide whether Pomeroy violated a "clearly established" right. *Id.* at 201-02, 121 S.Ct. 2151 ("[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established."). This "clearly established" standard *must* be met in order to permit the denial of qualified immunity. For these inquiries, we conduct a *de novo* review. *See, e.g., Tuggle v. Mangan,* 348 F.3d 714, 719-20 (8th Cir.2003) (standard of review).

In support of the argument that plaintiff cannot establish a constitutional violation as a matter of law, Pomeroy maintains, among other things, that at one point Pomeroy saw Parks's hand on Gottstein's gun while the two were struggling and that "Pomeroy believed that his partner was telling him what was going on." Brief for Appellant at 22. Based upon these and other circumstances such as plaintiff's 911 call and the rapid, dangerous, and uncertain manner in which events unfolded, Pomeroy argues that no constitutional violation can be established as a matter of law. Brief for Appellant at 24-26 (citing, e.g., *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) ("Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect

poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. . . . The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.")).

The district court was well aware of the precedents now cited by Pomeroy. *See* slip op. at 10-11 (quoting *Graham v. Connor,* among other cases). The district court nevertheless concluded, based upon the totality of the circumstances, that there was sufficient evidence to support a finding that Pomeroy's shooting of Parks was objectively unreasonable.[4] The district court held:

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[4] It is true that Pomeroy was forced to make a quick and difficult decision under dangerous and uncertain circumstances. On the other hand, the district court was warranted in assuming the following factual allegations and inferences. When the officers arrived at the house, Parks had calmed down and had not become violent as plaintiff had feared. When Gottstein told Parks he would have to leave, Parks responded that he did not have to leave his own house when he had done nothing wrong. The officers did not tell Pomeroy that he was under arrest or that he was suspected of any crime. Gottstein (who was considerably smaller than Parks) lunged at Parks, and, at that point, Parks rebuffed him by raising up his hand. Gottstein then grabbed Parks by the throat, sprayed Parks in the face with OC spray, and ended up on the floor underneath the obviously much bigger man. Gottstein was then heard to say, "I think he's going for my gun." From the time Gottstein made that statement until the moment Parks was shot, Parks remained on his hands and knees with his left hand on the floor bracing himself. When Pomeroy instructed Parks not to go for Gottstein's gun, Parks (having just been repeatedly sprayed in the face with OC spray) responded: "I'm not. I can't see." Before he fatally shot Parks, Pomeroy had at least enough time to aim and fire his weapon twice and to perform the "malfunction drill" each time. Finally, at the time Pomeroy fired that third and fatal shot, he could see that Parks's left hand was not on Gottstein's gun.

> The differing testimony of Mrs. Parks and Officer Pomeroy gives rise to a factual dispute about what Mr. Parks was doing just prior to and at the time he was shot. This factual dispute goes to the heart of the matter. Viewing the record in the light most favorable to Plaintiff, a reasonable jury could find that Officer Pomeroy shot Mr. Parks despite the fact that he could see that Mr. Parks' hand was not on Officer Gottstein's firearm, and that therefore Mr. Parks did not pose an immediate threat to the safety of the officers or others. A reasonable jury could find such a shooting unreasonable.

Id. at 12.

We agree with the Seventh Circuit's observation that the initial inquiry under *Saucier v. Katz,* 533 U.S. at 201, 121 S.Ct. 2151, "starts with separating factual and legal components of the claim for relief." *Anderson v. Cornejo,* 355 F.3d 1021, 1022 (7th Cir.2004) (reversing denial of qualified immunity on interlocutory appeal upon concluding that the facts alleged by the plaintiffs, when viewed in the light most favorable to them, could not establish the actual elements of their equal protection claim).[5] In the present case, the issue of whether Pomeroy used objectively unreasonable force when he fatally shot Parks is a question of fact. *See, e.g., Kuha v. City of Minnetonka,* 365

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[5] In *Anderson v. Cornejo,* 355 F.3d 1021, 1022-28 (7th Cir.2004), the Seventh Circuit held, for example, that the plaintiffs' evidence was relevant to show disparate impact, not disparate treatment, and yet "the equal protection guarantee is concerned only with the latter"; the record "evince[d] nothing more than negligence," and yet the plaintiffs' constitutional claim required proof of deliberate indifference; the plaintiffs attempted to prove vicarious liability, and yet vicarious liability was "not allowed" under the plaintiffs' equal protection theory.

F.3d 590, 597-98 (8th Cir.2003) (as amended Apr. 27, 2004) ("[T]he relevant inquiry is whether [the plaintiff] presented enough proof in support of his claim that a jury could properly find that the degree of force used against him was not 'objectively reasonable.' ").

As indicated above, we lack jurisdiction at the present stage of the litigation to review the district court's conclusions regarding the sufficiency of the evidence to establish material facts. *See Johnson v. Jones,* 515 U.S. at 313, 115 S.Ct. 2151 ("We now consider the appealability of a portion of the district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' *i.e.,* which facts a party may, or may not, be able to prove at trial. This kind of order, we conclude, is not appealable."). Accordingly, we lack interlocutory appellate jurisdiction to review the district court's conclusion that plaintiff may be able to prove as a matter of fact that Pomeroy's use of force was not objectively reasonable. *See, e.g., Krein v. Norris,* 309 F.3d 487, 493 (8th Cir.2002) ("[T]o the extent defendants appeal the district court's holding that there remain genuine issues of material fact, and to the extent that they challenge the sufficiency of plaintiff's evidence to support that conclusion, we hold that we lack interlocutory appellate jurisdiction.") (internal footnote omitted); *accord Garvin v. Wheeler,* 304 F.3d 628, 633-34 (7th Cir.2002) (in Fourth Amendment case involving a claim of excessive use of deadly force, dismissing the police officer's interlocutory appeal from a denial of qualified immunity as untimely filed, but noting that "there is another reason to decline to exercise jurisdiction. . . . [The district court] correctly observed that this is a factual, not a legal dispute . . . [and Supreme Court precedent] does not allow us to hear

disputes on interlocutory appeal regarding which facts the parties might be able to prove at trial.").

Therefore, when the facts are taken in the light most favorable to plaintiff for purposes of the "initial inquiry" under *Saucier v. Katz,* 533 U.S. at 201, 121 S.Ct. 2151, we must assume that the amount of force used by Pomeroy was unreasonable. As a result, we conclude at this threshold stage that plaintiff may be able to prove that Pomeroy violated Parks's Fourth Amendment right. *See id.* at 201-02, 121 S.Ct. 2151 ("[T]here is no doubt that *Graham v. Connor,* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness."); *Tauke v. Stine,* 120 F.3d 1363, 1365-66 (8th Cir.1997) (applying Fourth Amendment objectively reasonableness standard to use of deadly force).

However, our inquiry does not end there. As stated above, "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was *clearly established.*" *Saucier v. Katz,* 533 U.S. at 201, 121 S.Ct. 2151 (emphasis added). This inquiry "remains distinct" from the analysis of the excessive force claim. *Id.* at 204, 121 S.Ct. 2151.

> The qualified immunity inquiry . . . has a further dimension. The concern of the [qualified] immunity inquiry is to acknowledge that reasonable mistakes can be made as to the *legal constraints* on particular police conduct. It is sometimes difficult for an officer to determine how the relevant *legal doctrine,* here excessive force, will apply to the factual situation the officer confronts. As officer might correctly perceive all of the relevant facts but have a mistaken understanding as to

> whether a particular amount of force is legal in those circumstances. If the officer's mistake as to *what the law requires* is reasonable, however, the officer is entitled to the immunity defense.

Id. at 205, 121 S.Ct. 2151 (emphasis added).

In other words, we now ask – not whether plaintiff may be able to establish a constitutional violation – but, rather, whether she may be able to establish a violation of a constitutional right of which the contours were so defined at the time of the shooting that a reasonable officer in Pomeroy's position would have understood that what he was doing violated the law. *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). Stated differently, Pomeroy is entitled to qualified immunity even if he wrongly, but reasonably, believed his actions were lawful.

Pomeroy cites numerous Fourth Amendment excessive force cases for the proposition that he was acting lawfully – *or at least reasonably thought he was* – at the time of the shooting. For example, he cites *Nelson v. County of Wright,* 162 F.3d 986 (8th Cir.1998) (*Nelson*).

In *Nelson,* a Fourth Amendment excessive force case, we reviewed a grant of qualified immunity which was based upon the conclusion that, even viewing the evidence in the light most favorable to the plaintiff, the defendant-officer's actions were objectively reasonable when he used potentially deadly force to subdue the plaintiff in the plaintiff's own home. In that case, when the officer went to the plaintiff's home, after the plaintiff's mother had called the police, the officer knew that the plaintiff had

previously been treated for chemical dependency, he was suicidal and had been acting violently, and he had taken a number of pills. The plaintiff actively resisted the officer's efforts to arrest him without force, which led to a physical struggle in which the plaintiff at one point reached for the officer's gun and subsequently shoved the officer on the floor and into a closet. At one point in the struggle, the officer hit the plaintiff over the head with his "asp." After being shoved in the closet, the officer fired his gun at the plaintiff and wounded him. The entire encounter between the officer and the plaintiff lasted less than three minutes. *See id.* at 990-91. Under these circumstances, we held:

> Even when the facts are viewed in the light most favorable to [the plaintiff], it is clear that the physical fight was intense and that there would have been little time for the officer to reflect as the situation quickly escalated. [The plaintiff] now tries to analyze the brief struggle as if the incident were composed of distinct and separate segments. At the time, however, it was uncertain what would happen next. The situation was tense and "rapidly evolving." An "officer's actions are not to be assessed with 20/20 hindsight" when he was faced with the need to make instantaneous decisions.

Id. at 991 (citations omitted).

In light of this and other similar precedents, we cannot say that, at the moment of Parks's fatal shooting, Pomeroy reasonably should have known that what he was doing violated Parks's constitutional rights. In the present case, even if we assume that Pomeroy could see Parks's left hand on the floor at the moment of the shooting, it cannot be disputed that Gottstein's gun was nevertheless just inches from Parks's hand. As in *Nelson,* the physical

struggle between Parks and Gottstein was hostile and intense, the circumstances were extremely volatile and potentially deadly, and the events were evolving rapidly. Therefore, notwithstanding plaintiff's citation of arguably contrary Fourth Amendment cases, we hold, upon *de novo* review, that – given the state of the law at the time and the particular facts of this case – Pomeroy did not violate a *clearly established* constitutional right. "Qualified immunity operates in this case . . . just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force' and to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Saucier v. Katz,* 533 U.S. at 206, 121 S.Ct. 2151 (internal citation omitted).

The order of the district court denying Pomeroy qualified immunity is therefore reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

COLLOTON, Circuit Judge, concurring in the judgment.

I agree that the district court's decision denying Officer Pomeroy's motion for summary judgment should be reversed, but I respectfully disagree with the court's discussion of our jurisdiction over this appeal. Therefore, I concur only in the judgment.

Our marching orders for considering an appeal involving an assertion of qualified immunity come from the Supreme Court's decision in *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). The Court instructed that the "initial inquiry" must be whether, "[t]aken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct

violated a constitutional right." *Id.* at 201, 121 S.Ct. 2151. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* However, "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.* The court today declines to undertake what the Supreme Court said "must be the initial inquiry" (and instead assumes that Pomeroy's use of force was unreasonable), because it says we lack jurisdiction to decide whether the facts taken in the light most favorable to Parks show that Pomeroy's conduct was objectively unreasonable. *Ante,* at 955-56. I disagree.

To be sure, *Johnson v. Jones,* 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), established limits on jurisdiction over immediate appeals by government officials asserting a qualified immunity defense in a "constitutional tort" action. When a district court's order determines only "which facts a party may, or may not, be able to prove at trial," *id.* at 313, 115 S.Ct. 2151, there is no "final decision" within the meaning of 28 U.S.C. § 1291, and the order is not appealable. Thus, if Pomeroy had sought to appeal "whether the evidence could support a finding that particular conduct occurred," *Behrens v. Pelletier,* 516 U.S. 299, 313, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) – such as whether Mr. Parks placed his hand on the floor rather than on Officer Gottstein's gun at the time of the shooting, or whether Pomeroy shot Mr. Parks in the back of the shoulder rather than in the chest – then we would lack jurisdiction. *See, e.g., Garvin v. Wheeler,* 304 F.3d 628, 634 (7th Cir.2002) (no appellate jurisdiction in police shooting case where issues regarding police officer's credibility

made it possible that jury could disbelieve officer's testimony that suspect drew gun and credit plaintiff's version that suspect was neither armed nor resisting).

But Pomeroy did not appeal those fact-related determinations. His appeal assumes that all of the facts alleged by Parks are true, but asserts that the facts alleged do not show that the officer's conduct violated a constitutional right. The constitutional right involved is the Fourth Amendment's guarantee against unreasonable seizures, *Graham v. Connor,* 490 U.S. 386, 395-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), and Pomeroy's appeal asks us to determine whether the facts alleged, taken in the light most favorable to Parks, show that Pomeroy's use of force was "objectively unreasonable." *Id.* at 397, 109 S.Ct. 1865. This is precisely the sort of question that the Supreme Court in *Saucier* said "must be the initial inquiry" for a court of appeals, 533 U.S. at 201, 121 S.Ct. 2151, and I believe it presents an issue of law. *Hill v. McKinley,* 311 F.3d 899, 902 (8th Cir.2002); *White v. Balderama,* 153 F.3d 237, 241 (5th Cir.1998). It is the very question that we answered in *McCoy v. City of Monticello,* 342 F.3d 842, 848-49 (8th Cir.2003), and I conclude it is a matter that we have jurisdiction to decide. *Accord Billington v. Smith,* 292 F.3d 1177, 1183-85, 1191 (9th Cir.2002); *see also Lockridge v. Board of Trustees,* 315 F.3d 1005, 1009-12 (8th Cir.2003) (en banc) (employment discrimination); *Anderson v. Cornejo,* 355 F.3d 1021, 1023 (7th Cir.2004) ("[I]t is possible, consistent with *Johnson,* to cover the question whether the plaintiffs have a good legal theory as well as the immunity defense; but, as *Johnson* and *Saucier* hold, this must be done by taking the evidence and reasonable inferences in plaintiffs' favor.") (citation omitted).

For essentially the reasons discussed by the court in its immunity analysis, *ante*, at 957, I conclude that the evidence, taken in the light most favorable to Mr. Parks, does not establish that this tragic situation involved a violation of the Fourth Amendment. Even assuming that Pomeroy could see Parks's left hand on the floor at the moment of the shooting, the undisputed facts remain that Pomeroy heard Officer Gottstein yell that he thought Parks was reaching for Gottstein's gun earlier in the encounter, the gun remained within reach of Parks during the ongoing struggle with Gottstein, and Parks refused to acquiesce in commands that he cease what the court rightly describes as a "hostile and intense" struggle. Given these "extremely volatile and potentially deadly" circumstances, *ante*, at 957-58, the evidence taken in the light most favorable to Parks does not support a conclusion that Pomeroy's use of force was objectively unreasonable. Accordingly, I concur in the judgment.

2003 WL 1571587 (D.Minn.)

United States District Court,
D. Minnesota.
Tamara Jean PARKS, Individually and as Trustee for the heirs and next of kin of Perry Michael Parks, Plaintiff,
v.
Michael POMEROY, Jeff Gottstein in their individual capacities as officers of the Woodbury Police Department, and the City of Woodbury, Defendants
No. CIV00-2191(MJD/SRN).

March 14, 2003.

Robert Bennett and Eric Haggeman, Flynn, Gaskins & Bennett, L.L.P. for and on behalf of Plaintiff.

Pierre N. Regnier and Joseph E. Flynn, Jardine, Logan & O'Brien, P.L.L.P. for and on behalf of Defendant Michael Pomeroy.

MEMORANDUM AND ORDER

DAVIS, J.

I. INTRODUCTION

This matter is before the Court on Defendant Michael Pomeroy's Motion for Summary Judgment.[1] In the underlying Complaint, Plaintiff Tamara Jean Parks alleges violations of the First, Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution pursuant to 42

[1] Plaintiff's claims against Defendants Jeff Gottstein and the City of Woodbury were dismissed with prejudice by Stipulation and Order for Dismissal dated September 17, 2001.

U.S.C. § 1983. Plaintiff bases these allegations on the shooting of decedent, Perry Michael Parks, by Defendant. For the reasons that follow, this Court denies Defendant's motion.

II. BACKGROUND

What started as a fairly typical evening out for Tamara Parks ("Mrs. Parks" or "Plaintiff") and Perry Parks ("Mr. Parks" or "decedent"), ended with Mr. Parks being shot by Officer Michael Pomeroy ("Officer Pomeroy") – the tragic conclusion to a struggle between Mr. Parks and Officers Pomeroy and Jeffrey Gottstein ("Officer Gottstein").

Around 5:30 p.m., on Saturday, June 3, 2000, the Parks went to Sunsets of Woodbury ("Sunsets"), a restaurant and bar located about a mile from the Parks' residence. While at Sunsets, Mrs. Parks saw Mr. Parks drink at least three 22-ounce mugs of beer. Just prior to leaving the bar, the couple had a disagreement regarding whether their teenage daughter should go out that evening. Mrs. Parks ended the conversation quickly because she did not like the tone in Mr. Parks' voice, and gave Mr. Parks the "silent treatment." Although Mr. Parks drove to the bar, Mrs. Parks drove home because the alcohol he consumed had affected Mr. Parks.

The couple arrived home at approximately 9:30 p.m. Shortly after arriving home, Mr. Parks started yelling and swearing at Mrs. Parks. Although it is not entirely clear from Mrs. Parks' deposition testimony what Mr. Parks was yelling about, it is reasonable to infer that it related to the earlier disagreement at Sunsets and Mrs. Parks' subsequent "silent treatment." Mrs. Parks made the decision to

leave and go to either a friend's house or to her sister-in-law's house because she didn't want to argue with Mr. Parks. While she was digging in her purse for her keys, Mr. Parks made a comment to their daughter Stacy that Mrs. Parks was going over to a friend's house. Mrs. Parks then said, "Yes. I'm going to a friend's house, Stacy. Why don't you go up to bed?"

It was at this point that Mr. Parks started yelling at Mrs. Parks, saying that Stacy did not have to go up to bed, and repeating several times to Mrs. Parks, "Fuck you. You're a bitch. I'm sick of this."

Stacy started crying and told Mr. Parks to shut up and be quiet. At one point, Mr. Parks stepped towards Mrs. Parks and slammed his hand on the kitchen counter. Mrs. Parks responded by grabbing the telephone. She told Mr. Parks that if he did not calm down she would call and have him removed. Although Mrs. Parks does not remember the exact words, Mr. Parks responded with something to the effect of "go ahead."

Mrs. Parks subsequently called 911. The relevant portions of the conversation between Mrs. Parks and the 911 dispatcher are as follows:

WD:[2] 911 Emergency.

TP:[3] Can you send someone to 2704 Horseshoe Lane.

WD: What's happening?

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[2] Woodbury dispatcher.

[3] Mrs. Parks.

TP: It's a big mess here. Uh, my husband's drunk, and he's getting very violent.

WD: Okay, is it physical?

TP: What?

WD: Is it physical?

TP: N-not- well, not yet. But it's gonna [sic] get there. My girls are here.

* * *

WD: I would like to keep you on the phone, okay?

TP: Yeah.

WD: Is your name Tami?

TP: Yeah, it's Tami.

WD: Okay.

TP: Come get him out of here.

WD: Yep, we are.

* * *

TP: He's downstairs.

WD: All right. And this occurred – occurred before?

TP: Well, this is the first time I've seen him this bad.

WD: Okay.

While Mrs. Parks was on the phone with the 911 dispatcher, a call went out to Woodbury police officers to respond to the domestic dispute call. Officer Gottstein was

the first to respond. The 911 dispatcher informed him of the address and some basic details: "Husband/wife. Male is [drunk]. No weapons. It's not physical at this point, but it sounds like it might get there." The dispatcher then asked for another squad to assist Officer Gottstein. Officer Pomeroy indicated that he was responding. The dispatcher subsequently broadcast more information: "It's a husband/wife domestic . . . the father is [drunk] . . . [a]pparently it's husband versus wife. The husband is [drunk]. Children are involved."

Officers Gottstein and Pomeroy arrived at the Parks' residence at approximately 9:51 p.m. Officer Pomeroy informed the dispatcher that both of the officers were on the scene. Officers Gottstein and Pomeroy entered the residence and encountered Mr. Parks in the kitchen. The kitchen was well lit at the time. Mr. Parks was standing near the kitchen sink in the corner of the kitchen. At this point, Mrs. Parks was standing near the stairs looking into the kitchen.

One of the officers, possibly Officer Gottstein, asked Mr. Parks what was going on and Mr. Parks responded with a shrug. Officer Gottstein then told Mr. Parks, "We're going to get you out of here."

Mr. Parks responded, "No. This is my house. I didn't do anything."

At that point Officer Gottstein stepped forward and grabbed him by the arm. Mr. Parks put up his arms to stop Officer Gottstein, and Officer Gottstein lost his balance and took a step back. Officer Gottstein then came forward and grabbed Mr. Parks by the throat. A scuffle ensued,

with Officer Gottstein using his OC spray.[4] Mr. Parks and Officer Gottstein ended up going to the floor, with Mr. Parks having Officer Gottstein in a headlock. Mr. Parks was on top of Officer Gottstein facing the opposite direction.

Officer Gottstein testified that while on the floor he felt his belt and firearm being moved. Officer Gottstein wore his firearm on his right side. Mr. Parks' left hand was closest to Officer Gottstein's firearm. Officer Gottstein believed that Mr. Parks had his hand on his firearm. Officer Gottstein yelled, "I think he's going for my gun."

While Officer Gottstein and Mr. Parks were struggling on the floor, Officer Pomeroy attempted to engage Mr. Parks. Officer Pomeroy testified at his deposition that he was trying to get Mr. Parks off of Officer Gottstein. Officer Pomeroy testified that, despite the presence of the OC spray, he could clearly see. When Officer Gottstein yelled that Mr. Parks was trying to get his gun, Officer Pomeroy drew his firearm and placed it in Mr. Parks' right shoulder. Officer Pomeroy testified that at that point he could not see if Mr. Parks was attempting to remove Officer Gottstein's firearm, but instead was relying on Officer Gottstein's statement. Pomeroy testified that he began yelling, "let go of the gun, let go of the gun."

When Mrs. Parks saw Officer Pomeroy draw his firearm she screamed, "Perry. Perry," and ran up behind Mr. Parks. Mrs. Parks told Officer Pomeroy not to shoot and attempted to pull Mr. Parks apart from Officer Gottstein. Mrs. Parks testified that, despite the presence of the

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[4] "OC" is an abbreviation for "oleoresin capsicum." OC spray is also known as "pepper spray."

OC spray, she could see. She asserts that she looked down and could see that Mr. Parks' left hand was on the floor bracing him, and not on Officer Gottstein's firearm. She also asserts that Officer Pomeroy told Mr. Parks, "Don't go for the gun," to which Mr. Parks responded, "I'm not. I can't see."

Officer Pomeroy testified that he looked down and was able to see Officer Gottstein's hand on the grip of the firearm as well as Mr. Parks' hand also on the grip. Mr. Parks' hand was covering part of Officer Gottstein's hand. Officer Pomeroy also testified that he could see the firearm partially withdrawn from the holster. Officer Pomeroy attempted to shoot Mr. Parks, but his firearm only clicked and did not discharge a round. He then attempted a malfunction drill, which consisted of banging the bottom of the ammunition magazine with his hand. Officer Pomeroy asserts that he gave Mr. Parks more commands to let go of the gun or he would shoot him. An attempt to shoot Mr. Parks was made again, but again the firearm misfired. Officer Pomeroy stood up, tapped the magazine again and racked the slide of his firearm. A round ejected from the firearm. At some point during the struggle, Mrs. Parks backed off, asserting that Officer Pomeroy brought his gun up with the barrel pointed at her face.

Officer Pomeroy again placed the gun into Mr. Parks' body. Mr. Parks was at this time looking up at Officer Pomeroy. Officer Pomeroy asserts that throughout the struggle he repeatedly told Mr. Parks to "let go of the gun" or "don't go for the gun." Officer Pomeroy pulled the trigger a third time, successfully discharging a round into Mr. Parks. Officer Pomeroy testified that at the time he pulled the trigger he could still see Mr. Parks' hand and that it was still on Officer Gottstein's firearm. To the

contrary, Mrs. Parks testified that she saw Mr. Parks' hand on the floor at the time he was shot. Mr. Parks died a short time later as a result of the gunshot wound. Only three or four minutes elapsed from the time the officers entered the residence until Officer Pomeroy shot Mr. Parks.

III. DISCUSSION

A. Legal Standard

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.,* 980 F.2d 1217, 1219-20 (8th Cir.1992). The nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *See Krenik v. County of Le Sueur,* 47 F.3d 953, 957 (8th Cir.1995). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986); *Krenik,* 47 F.3d at 957. The Court must view the evidence, and the inferences that may be reasonably drawn from the evidence, in the light most favorable to the nonmoving party. *See Enter. Bank v. Magna Bank,* 92 F.3d 743, 747 (8th Cir.1996).

B. Plaintiff's Claims

Section 1983 guarantees legal or equitable remedies to an individual who is deprived "of any rights, privileges, or immunities secured by the Constitution and laws" of the

United States by any person acting under the color of state law. *See* 42 U.S.C. § 1983; *Gomez v. Toledo,* 446 U.S. 635, 638 (1980); *Omni Behavioral Health v. Miller,* 285 F.3d 646, 650-51 (8th Cir.2002). In order to state a claim under section 1983, a plaintiff must allege: 1) deprivation of a federal right by some person; and 2) that the person acted under the color of state law. *See Gomez,* 446 U.S. at 640; *Armstrong v. Fairmont Cmty. Hosp. Ass'n, Inc.,* 684 F.Supp. 1486, 1488 (D.Minn.1987).

Plaintiff alleges that Officer Pomeroy, acting under the color of state law, violated decedent's constitutional rights when he shot Parks during the struggle with Officer Gottstein and Officer Pomeroy. An individual may recover damages from a state or local official who commits a constitutional tort. *See Jones v. United States,* 16 F.3d 979, 980 (8th Cir.1994). The excessive use of force by a police officer against an arrestee is such a tort. *See Johnson v. Jones,* 515 U.S. 304, 307 (1995). Plaintiff has thus stated a cognizable section 1983 claim.

C. Officer Pomeroy's Motion

Officer Pomeroy asks the court to dismiss Plaintiff's claims against him as a matter of law, identifying two grounds for dismissal: 1) that the facts cannot establish a constitutional violation; and 2) that, even if the facts can establish a constitutional violation, he is entitled to qualified immunity. *See Saucier v. Katz,* 533 U.S. 194, 201 (2001). Qualified immunity protects state and local police officers from liability when their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Officer Pomeroy also

asks the Court to dismiss Plaintiff's punitive damages claim.

1. Constitutional Violation

Plaintiff alleges violations of the First, Fourth, Fifth and Fourteenth Amendments. The gravamen of her complaint, however, is that Officer Pomeroy used excessive force and unreasonably seized Mr. Parks by shooting him.[5] "All claims that law enforcement officials used excessive force . . . in the course of making an arrest or other 'seizure' of a free citizen are properly analyzed under the Fourth Amendment." *Cole v. Bone,* 993 F.2d 1328, 1332 (8th Cir.1993) (citing *Graham v. Connor,* 490 U.S. 386, 394-95 (1989)).

The Court is thus tasked with determining whether Officer Pomeroy's seizure of Mr. Parks comprised a constitutional violation if the record is construed in a light most favorable to Plaintiff. Such a determination involves an inquiry into whether Officer Pomeroy's seizure of Mr. Parks was objectively reasonable under the Fourth Amendment. *See Graham,* 490 U.S. at 395-96. The reasonableness inquiry "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [wa]s actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. The reasonableness of

[5] The Court recognizes that it is an unavoidable understatement to characterize the shooting as a "seizure," but it is under that rubric that Plaintiff's claims must be analyzed. *See Gardner v. Buerger,* 82 F.3d 248, 251 (8th Cir.1996).

the force used "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

The Court must balance "the nature and quality of the intrusion on Fourth Amendment interests against the countervailing government interests." *Id.* In balancing the nature and quality of the intrusion with countervailing government interests, it is important to keep in mind " 'the intrusiveness of a seizure by means of deadly force is unmatched.' " *Tauke v. Stine,* 120 F.3d 1363, 1366 (8th Cir.1997) (quoting *Tennessee v. Garner,* 471 U.S. 1, 9 (1985)). *Graham* clearly establishes the general proposition that the use of force is actionable under the Fourth Amendment if it is excessive under objective standards of reasonableness. *See Saucier v. Katz,* 533 U.S. 194, 201-02 (2001). Deadly force is reasonable under the Fourth Amendment when there is probable cause of immediate threat of death or serious bodily injury. *See Garner,* 471 U.S. 1 at 11.

The 911 dispatcher informed the officers responding to Mrs. Parks' 911 call that there was a domestic disturbance involving a husband and wife, and that children were involved. The dispatcher also informed them that it was not physical at that point, but it might get there and that the husband was drunk. Upon arriving at the residence they encountered Mr. Parks in the kitchen and attempted to get him to come with them. Mr. Parks refused, stating that he was in his house and that he had not done anything.

The officers attempted to place him under physical control, however, neither officer told Mr. Parks that he was under arrest or suspected of any crime before attempting

to physically subdue him. Mr. Parks resisted the officers and a struggle ensued in which he ended up on top of Officer Gottstein. Officer Gottstein believed that Mr. Parks was attempting to grab his firearm and vocalized his fear. Officer Pomeroy ordered Mr. Parks to not attempt to grab Officer Gottstein's firearm and drew his own firearm, thereafter shooting Mr. Parks. The entire incident took place in a well lit room, and Officer Pomeroy asserts that he was able to see Mr. Parks' hands throughout the struggle.

The reasonableness of Officer Pomeroy's beliefs and actions are dependent upon Mr. Parks' actions during the struggle with Officer Gottstein and Officer Pomeroy. *See e.g., Wilson v. City of Des Moines,* 293 F.3d 447, 451 (8th Cir.2002); *see also McCaslin v. Wilkins,* 183 F.3d 775, 779 (8th Cir.1999). Officer Pomeroy asserts that he could see Mr. Parks' hand and that throughout the struggle Mr. Parks continued to try and access Officer Gottstein's firearm. Mrs. Parks, however, tells a different tale. She testified that she could see Mr. Parks' left hand on the floor at the time he was shot. Additionally, she asserts that, in response to Officer Pomeroy's command to not go for the gun, Mr. Parks said, "I'm not. I can't see."

The differing testimony of Mrs. Parks and Officer Pomeroy gives rise to a factual dispute about what Mr. Parks' was doing just prior to and at the time he was shot. *See McCaslin,* 183 F.3d at 779. This factual dispute goes to the heart of the matter. Viewing the record in a light most favorable to Plaintiff, a reasonable jury could find that Officer Pomeroy shot Mr. Parks despite the fact that he could see that Mr. Parks' hand was not on Officer Gottstein's firearm, and that therefore Mr. Parks did not pose an immediate threat to the safety of the officers or others.

A reasonable jury could find such a shooting unreasonable. Viewing the record in a light most favorable to Plaintiff, she has made out a constitutional violation.

Officer Pomeroy makes much of Officer Gottstein's belief that, throughout the struggle, Parks was attempting to acquire his firearm. This Court has no reason to doubt that Officer Gottstein believed that Parks was attempting to acquire his firearm, as Officer Gottstein could not see what was going on. Officer Pomeroy asserts that he believed that his partner was telling him what was happening, and therefore his actions were reasonable under the circumstances. *Cf. Liu v. Phillips,* 234 F.3d 55, 57-58 (1st Cir.2000) (stating that officer entitled to qualified immunity where reasonable reliance on information from fellow officer); *State v. Conaway,* 319 N.W.2d 35, 40 (Minn.1982) (stating that arresting officer entitled to rely on collective information). This argument misses the point. Officer Pomeroy asserts that he saw Parks' hand on Officer Gottstein's firearm. Officer Pomeroy's testimony leads to the inescapable conclusion that he was in a position to see what Officer Gottstein couldn't – whether Parks was in fact attempting to acquire Officer Gottstein's firearm. Officer Pomeroy cannot rely on Officer Gottstein's belief to support his actions when he was in a better position to assess the situation.

To determine conclusively that Officer Pomeroy acted in an objectively reasonable manner would involve a judgment by this Court as to the veracity of the witnesses' accounts. At this juncture, the Court is prohibited from weighing the evidence and making credibility determinations. *See Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 150 (U.S.2000). On the record before the Court, a reasonable jury could find that Officer Pomeroy's

actions were not objectively reasonable under the facts and circumstances to which he was presented. Plaintiff has identified specific factual disputes that a jury must resolve.

2. Clearly Established Right

In order to survive summary judgment on the second *Saucier* prong, a plaintiff must show that "the law . . . clearly put the officer on notice that his actions [we]re unreasonable." *Wilson,* 293 F.3d at 450. However, summary judgment is appropriate even if the officer reasonably, but wrongly, believed that the actions taken were reasonable under the circumstances. *Saucier,* 533 U.S. at 206.

This Court is required to determine whether Officer Pomeroy was clearly on notice that a use of deadly force on an individual, without probable cause to believe that individual posed an immediate threat to officers or others, would violate the Fourth Amendment. Deadly force is reasonable under the Fourth Amendment when there is probable cause of immediate threat of death or serious bodily injury. *See Garner,* 471 U.S. at 11; *Nelson v. County of Wright,* 162 F.3d 986, 990 (8th Cir.1998). Stated in the negative, use of force is unreasonable under the Fourth Amendment if it "'is excessive under objective standards of reasonableness.'" *Wilson,* 293 F.3d at 450 (quoting *Saucier,* 533 U.S. at 201-02).

As explained above, a reasonable jury could conclude that Officer Pomeroy shot Mr. Parks despite the fact that he did not pose an immediate threat to the officers or to others. A reasonable police officer would have clearly been on notice in June of 2000 that no greater force should be

used in making an arrest than was reasonable under the circumstances, and that deadly force would be unreasonable unless there was probable cause to believe that officers or others were faced with an immediate threat of serious physical harm. *See Nelson,* 162 F.3d at 986.

C. Punitive Damages

The purpose of an award of punitive damages is to punish an individual for outrageous conduct and to deter the individual and others like him from similar conduct in the future. *See Smith v. Wade,* 461 U.S. 30, 46 (1988); Restatement (Second) of Torts § 908(1). "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2).

This court must determine whether the facts in the record, interpreted in a light most favorable to Plaintiff, show that Officer Pomeroy acted with evil motive or intent, or with reckless or callous indifference to the federally protected rights of others. *See, Smith,* 461 U.S. at 56; *Cornell v. Woods,* 69 F.3d 1383, 1391 (8th Cir.1995). Whether Officer Pomeroy's conduct was sufficiently callous so as to justify punitive damages is a question of ultimate fact. *See Coleman v. Rahiia,* 114 F.3d 778, 787 (8th Cir.1997).

The district court for the Eastern District of Pennsylvania recently addressed the correlation between a denial of summary judgment as to qualified immunity and a denial of summary judgment as to punitive damages. *See Russoli v. Salisbury Township,* (E.D.Pa.2000). The court concluded that:

> [t]he objective standard of 'callous or reckless indifference' that suffices for an award of punitive damages is not far removed from the standard for denying qualified immunity to the officers – whether a reasonable officer would have known that his conduct violated a clearly established constitutional right. Therefore any claim that will be tried and for which the jury finds facts that would result in our denying qualified immunity could also be the basis for punitive damages. Whether or not punitive damages are appropriate will depend on the jury's findings as to the circumstances of the Officers' actions and their states of mind.

Id.; accord Davis v. Hill, 173 F.Supp.2d 1136, 1147 (D.Kansas 2001); *but see Lavicky v. Burnett,* 758 F.2d 468, 477 (10th Cir.1986) (stating that even arrogant ignorance of applicable legal rules does not by itself indicate callous or reckless indifference).

This Court agrees with the reasoning in *Russoli,* and concludes that the same factual issues precluding summary judgment on Officer Pomeroy's qualified immunity defense preclude summary judgment on his request for summary judgment on Plaintiff's punitive damages claim. The Court notes that this does not necessarily mean that Plaintiff is entitled to punitive damages. Indeed, while reasonable jurors could alternatively conclude that Officer Pomeroy acted with reckless or callous indifference to Mr. Parks' Fourth Amendment rights, they could conclude that Officer Pomeroy was in fact acting objectively reasonably. *See, e.g., Habiger v. City of Fargo,* 905 F.Supp. 709, 724 (D.N.D.1995) (noting that jury could find officers' conduct justified, negligent, reckless or grossly negligent or willful).

IV. CONCLUSION

Plaintiff has identified specific evidence in the record which would allow a jury to find that Officer Pomeroy's conduct was not objectively reasonable and violated decedent's clearly established Fourth Amendment rights. The same specific evidence would also allow a reasonable jury to find that Officer Pomeroy acted with reckless and callous indifference with respect to decedents' Fourth Amendment rights.

Accordingly, based upon the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendant's Motion for Summary Judgment is DENIED.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 03-2043

Tamara Jean Parks,	:	
Appellee,	:	Order Denying Petition for Rehearing and for Rehearing En Banc
vs.	:	
Michael Pomeroy,	:	
Appellant.	:	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

December 20, 2004

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

Supreme Court, U.S.
FILED
APR 21 2005
OFFICE OF THE CLERK

No. 04-1268

In The
Supreme Court of the United States

TAMARA JEAN PARKS, individually and as Trustee for the heirs and next-of-kin of Perry Parks,

Petitioner,

vs.

MICHAEL POMEROY, in his individual capacity as an officer of the Woodbury Police Department,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT POMEROY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals properly held that Officer Pomeroy was entitled to qualified immunity where, given the state of the law at the time and the particular facts of this case, Pomeroy did not violate a clearly established constitutional right.

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RULES OF THE SUPREME COURT OF THE UNITED STATES

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JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for certiorari only for compelling reasons. According to Rule 10, compelling reasons may be found if there is a conflict of authority between another court of appeals or state court of last resort on the same issue or if the decision reflects a far departure from the usual course of judicial proceedings or if the decision presents an important question of federal law that has not been but should be settled by this Court.

Petitioner has not set forth an adequate basis to justify the exercise of the Court's discretionary jurisdiction. Petitioner's argument that the Court of Appeals improperly transformed the objective test in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001), into a subjective test is not supported by any studied review of the Eighth Circuit's analysis of the second step of the qualified immunity analysis. Petitioner has failed to set forth a sufficient basis for review by this Court. Further, for the reasons explained below, there was no error in the Eighth Circuit's decision in this case.

STATEMENT OF THE CASE

Officer Michael Pomeroy sets forth the following uncontroverted facts from the record in supplement to the facts set forth in the Memoranda and Orders of the lower courts that Pomeroy also accepts as uncontroverted.

On the evening of June 3, 2000, at 9:45 p.m., Tamara Parks called 911 Emergency Dispatch reporting, "My

husband's drunk and he's getting very violent." Tamara Parks and her husband, decedent Perry Parks, had gone to the Sunset Bar at 5:30 that afternoon. Before leaving for the bar, Tamara observed Perry Parks carrying a beer can. While at the Sunset Bar, Perry Parks consumed three 22-ounce mugs of beer and part of Tamara Parks' second 22-ounce mug. Tamara and Perry Parks had a disagreement in the bar. Perry Parks was affected by the alcohol so Tamara Parks drove home. They left the bar around 9:20 or 9:25 p.m. and arrived at their home in Woodbury at 9:30 p.m.

Upon arriving home at 2704 Horseshoe Lane in Woodbury, a one-sided argument ensued with Perry Parks screaming and swearing at Tamara Parks. Perry Parks was yelling to Tamara Parks, "Fuck you, you're a bitch. I'm sick of this" and repeated this many times. Perry Parks had never sworn at Tamara Parks and had never screamed or hollered like that before. Tamara Parks believed that Perry Parks was getting very violent. Perry Parks came toward her and slammed his hand on the counter. Tamara Parks then grabbed the phone to call 911. Tamara Parks told Perry Parks that if he didn't calm down she was going to call and have him removed. Perry Parks told her to go ahead.

While this was going on in the house, Tamara Parks' two minor daughters were present. One of the daughters was crying. At one point, one of the daughters told Perry Parks that he was drunk.

At 9:45 p.m., Tamara Parks called 911 telling the 911 dispatcher that Perry Parks was getting very violent. Tamara Parks asked the dispatcher to send somebody to 2704 Horseshoe Lane. Tamara Parks further told the 911

dispatcher, "It's a domestic" and that "My husband's drunk and he's getting very violent." (Perry Parks was later determined to have a blood alcohol content of .16).

The 911 dispatcher asked Tamara Parks whether it was physical and she responded, "Well not yet, but it's going to get there." Tamara Parks called for police officers to come and remove Perry Parks. Tamara Parks told the dispatcher, "Can you take him away?" While Tamara Parks was talking to the dispatcher, she told Perry Parks, "Get away from me" in response to Perry Parks coming toward her. Tamara Parks was backing down the hall and was fearful that Perry Parks was coming after her. Tamara Parks then told the 911 dispatcher, "Just come and get him out of here."

At the time that Tamara Parks called 911 Emergency Dispatch to remove her husband who was getting very violent, Officers Jeff Gottstein and Michael Pomeroy were on duty as patrol officers for the City of Woodbury. Gottstein had been a police officer with the City of Woodbury since 1994. Pomeroy had been a police officer since 1988 and had worked as a patrolman for the City of Woodbury since 1994.

Dispatch called for Woodbury police officers to respond to a domestic at 2704 Horseshoe Lane. Officer Gottstein who was designated as "665" responded. The dispatcher then came back and said "665, 2704 Horseshoe Lane. Husband/wife. Male is DK. No weapons. It's not physical at this point, but it sounds like it might get there." Dispatch further indicated that the name was Parks. Dispatch then asked for a squad to assist and Officer Pomeroy responded he would be en route to the incident. The dispatcher informed the officers that it was a husband and

wife domestic, that the husband was drunk and children were involved.

According to Tamara Parks, after Officers Gottstein and Pomeroy entered the residence, they ended up in the kitchen with Perry Parks. Both officers were in full uniform. Perry Parks was standing in the corner of the kitchen near the kitchen sink. The children were upstairs.

One of the officers asked Perry Parks what was going on and received no response. As this was reported as a domestic dispute and Officers Pomeroy and Gottstein had not had an opportunity to assess what was going on, for officer safety reasons, they needed to control the movements of the persons in the house to make sure that the officers and the persons inside the house were safe. Officers Pomeroy and Gottstein observed knives in the kitchen on a counter. The officers overheard Perry Parks make a comment about the knives. Officer Gottstein was concerned about Parks' access to the knives. Due to Perry Parks' increasing agitation, the officers attempted to convince Parks to go into another room and keep him away from the knives.

One of the officers allegedly then said, "We're going to get you out of here." From the upstairs of the residence, Tamara Parks' daughter could hear the police officers say, "Sir" a couple of times and then heard Perry Parks say, "Get out of my space. This is my house." Perry Parks refused to go with the officers. The shorter officer, Gottstein, grabbed Perry Parks by his left arm. Perry Parks put up his arms to stop the officer like he was going to push off. The shorter officer who held Perry Parks by the left arm then "walked into [Parks'] hands."

Officer Gottstein considered Perry Parks' initial movement to be an attempt to grab a knife from that area.

Gottstein grabbed the two knives that he observed on the counter and threw them into a laundry hallway area.

After Perry Parks put out his hands in a manner like he was going to push off, Gottstein walked into Perry Parks' hands and Gottstein lost his balance and took a step back. The 5'5" 170-pound Officer Gottstein then came forward and grabbed the 5'10" 220-pound Perry Parks by the throat with his left hand.

According to Tamara Parks, Perry Parks then flew back into the counter and Parks then came forward away from the counter and scuffling ensued. Perry Parks moved toward the middle of the kitchen. Officer Gottstein stepped back and Perry Parks stepped forward. When Perry Parks stepped forward, Gottstein now had his left hand on Parks' left shoulder. While his left hand was on Perry Parks' left shoulder, Gottstein took out his Oleoresin Capsicum ("OC") spray with his right hand and sprayed. Officers Pomeroy and Gottstein are trained to be able to continue working in an OC contaminated area.

Perry Parks raised his arms and flailed his arms. Perry Parks and Officer Gottstein were struggling and moving toward the middle of the kitchen and the refrigerator. As Perry Parks moved toward the refrigerator, Officer Gottstein was trying to get Parks' left arm while continuing to spray the OC. Officer Pomeroy was right next to Gottstein and, along with Gottstein, backed into a rear entryway into the kitchen. Gottstein ended up bent over with Perry Parks' arm around Gottstein's neck in a headlock. Gottstein was trying to maintain his footing

and, at some point, Parks came down on him causing Gottstein to go down to the ground as well.

Officer Gottstein's duty holster was located on his duty belt on the right side of his hip. In the duty holster was Officer Gottstein's service weapon, a .40 caliber Beretta. When Officer Gottstein went down to the ground he tried to drop his right side to protect his firearm, but ended up flat on his stomach with the right side of his face pinned against the floor. Thus, Gottstein could not see his holster.

Officer Gottstein was on the floor on his stomach with his feet by the refrigerator. Perry Parks was the opposite direction of Gottstein and was facing the refrigerator. Officer Pomeroy was by the desk and counter.

Perry Parks was on his hands and knees and Parks' head was pushed into the officer's right shoulder and Officer Gottstein's head was partially underneath Parks. Gottstein's hand was extended out in front of Gottstein's head and went around Perry Parks' left arm and was holding Parks' shirt. When asked whether Perry Parks was holding Gottstein down on the floor, Tamara Parks' response was that only Perry could answer that. Obviously, Gottstein could also answer that and testified that Perry Parks was physically forcing him to the floor. Gottstein tried to get out from under Parks without success. While flat on his stomach, Officer Gottstein felt his belt and duty weapon being moved. Gottstein believed that Perry Parks had his hand on his weapon. Gottstein struck the wrist to get Parks' hand to release and pulled at his fingers. According to Tamara Parks, Gottstein yelled, "I think he's going for my gun." The transcript of the radio

transmission evidences that Gottstein was reporting "He's trying to get my weapon! I need help here!"

Another police officer responding to the officer's urgent call for assistance was en route when he heard this statement by Gottstein over the radio and described it as a cry for help by someone who was very, very scared. The officer thought by the time he got there, Gottstein would be dead.

In response to Gottstein yelling that Parks was attempting to take his weapon, Pomeroy looked over and observed Gottstein's hand on the grip of his gun and Perry Parks' hand was also on the grip of the gun, covering part of Gottstein's hand and the gun was partially withdrawn from the holster.

Based upon the information given to Officer Pomeroy by his partner, Officer Jeff Gottstein, Officer Pomeroy perceived that there was an immediate danger of death or great bodily harm to his partner and Officer Pomeroy believed that authorized him to use deadly force.

In response to Officer Gottstein yelling that Perry Parks was attempting to take away Officer Gottstein's service weapon, Pomeroy pulled out his service weapon and put the gun into the back of Perry Parks' right shoulder. Officer Pomeroy had considerable fear that Perry Parks was going to gain control of the gun and use the gun against them.

When Tamara Parks witnessed Officer Pomeroy pull out his service weapon in response to Gottstein yelling that Perry Parks was attempting to take Gottstein's service weapon, she screamed, "Perry, Perry" and ran up behind Perry, grabbed his shoulders and tried to pull

Perry Parks apart from the officer. She told Officer Pomeroy not to shoot. Gottstein was still prone on his stomach. Pomeroy warned Perry Parks, "Don't go for the gun." Pomeroy yelled at Perry Parks believing that his partner was telling him what was going on. Perry Parks responded, "I'm not. I can't see." At that point in time, Tamara Parks looked, and saw that Perry's left hand was on the floor and the officer's gun was not being touched. Tamara Parks testified, "**And that's when I looked**, and Perry's hand was on the floor and the officer's gun was not being touched." She could not see Parks' right hand. At that time, Gottstein's right hand was underneath Perry Parks, but she could not see whether he had a hold of Parks at all. Tamara Parks also did not know where Officer Gottstein's left arm and hand were at that point. At no point did Tamara Parks dispute Officer Gottstein's assertion that while Gottstein was on the floor with Parks during the short intense struggle, at some point Perry Parks had his hand on Gottstein's gun.

Officer Pomeroy was kneeling by Perry Parks' right shoulder and Officer Gottstein's left shoulder. Tamara Parks does not know what Pomeroy was doing, but noticed that he had his gun in his left hand and she looked down the gun barrel. Tamara Parks then screamed and backed up to the front of the steps. This was further back than her original location. Pomeroy was on his knees with his chest lying on Parks. Pomeroy attempted to fire his service weapon that he had pressed into Perry Parks' side. Tamara Parks heard a click. The gun did not fire. Pomeroy then attempted a malfunction drill and pulled the trigger a second time, but the weapon still did not fire. Pomeroy again performed the malfunction drill. Tamara Parks

heard a shot. Gottstein was still prone on the floor on his stomach when the shot was fired.

Officer Gottstein believed there was a high level of threat from the time he first felt a hand on [redacted] weapon to the time that the situation ended. Gottstein believed that the threat level was equally high whether or not he had his hand on the primary grip position because that could have changed in a millisecond.

When Pomeroy heard Gottstein yell that Parks was going for his gun, Pomeroy believed that his partner was telling him what was going on. Pomeroy saw no diminishment in the threat from the point at which he heard Gottstein say that Parks had his gun until the time Parks was shot. Pomeroy believed that the threat was increasing because the longer the struggle went on, the more tired Gottstein would become and he would be less and less able to maintain control to prevent Perry Parks from gaining control of the handgun.

After the shot was fired, Perry Parks came up to his knees, and then fell back. Perry Parks died a short time later as a result of a single gunshot wound. The entire incident from the time the officers entered the house until the shot was fired was three to four minutes.

REASONS FOR DENYING THE WRIT

A. Parks' argument that the Eighth Circuit applied a subjective standard instead of an objective standard to the qualified immunity analysis is not supported by reading the Eighth Circuit opinion.

In ruling on a qualified immunity issue, the first step is to determine whether the government official's conduct violated a constitutional right. The Court's next step is to ask whether such right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001).

The Eighth Circuit opinion assumed a constitutional violation and then proceeded to the next step of the qualified immunity analysis asking whether the right was clearly established in accord with *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001).[1] The Eighth Circuit in *Parks* recognized that its inquiry does not end at assuming that at this threshold stage Parks may be able to establish a constitutional violation. The Court recognized that the next sequential step is to ask whether the right was clearly established. "This inquiry remains distinct from the analysis of the excessive force claim." (Citation

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[1] Respondent disagrees with the majority opinion's conclusion that at this threshold stage, Parks may be able to prove that Pomeroy violated Parks' Fourth Amendment rights. For the reasons set forth in the concurring opinion by Judge Colloton, Respondent agrees that it was not even necessary to proceed to the second step in the qualified immunity analysis as, under the first step, no constitutional violation occurred. Because Pomeroy is responding to Parks' arguments concerning the application of the second step of the qualified immunity analysis, Pomeroy does not directly address the first step the existence of a constitutional violation.

omitted). (App. 13). The *Parks* opinion goes on to cite *Saucier*:

> The qualified immunity inquiry . . . has a further dimension. The concern of the qualified immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts, but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to *what the law requires* is reasonable, however, the officer is entitled to the immunity defense. *Id.* at 205, 121 S. Ct. 2151 (emphasis added).

(App. 13, 14).

Parks argues that in applying the second step to determine whether the right was clearly established, the Eighth Circuit Court of Appeals improperly transformed *Saucier*'s objective standards into a subjective test. Parks' argument is not supported by the plain language of the opinion in which the Eighth Circuit makes repeated reference to objective reasonableness and frames the issue as an objective inquiry into whether "a reasonable officer in Pomeroy's position would have understood that what he was doing violated the law." (App. 14).[2] Such analysis is entirely consistent with the dictates of the United States Supreme Court in *Saucier*, "the relevant dispositive inquiry in determining whether a right is clearly established is

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[2] App. references Petitioner's Appendix.

whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S. Ct. at 2156. The Court of Appeals in *Parks* held:

> Even if we assume that Pomeroy could see Parks' left hand was on the floor at the time of the shooting, it cannot be disputed that Gottstein's gun was nevertheless just inches from Parks' hand. As in *Nelson*, the physical struggle between Parks and Gottstein was hostile and intense, the circumstances were extremely volatile and potentially deadly, and events were evolving rapidly. Therefore, notwithstanding Plaintiff's citation of arguably contrary Fourth Amendment cases, we hold, upon *de novo* review, that – given the state of the law at the time and the particular facts of this case – Pomeroy did not violate a *clearly established* constitutional right.

(App. 15-16) (Emphasis in original). It is important to note that the Eighth Circuit obviously recognized the importance of analyzing the second step of the qualified immunity analysis as to whether clearly established law was violated because the Eighth Circuit opinion repeatedly bolded the term "*clearly established.*" (App. 13, 16).

The Court in *Parks* further delineated its utilization of an objective standard to conduct its qualified immunity analysis:

> In other words, we now ask, not whether plaintiff may be able to establish a constitutional violation – but, rather, whether she may be able to establish a violation of a constitutional right of which the contours were so defined at the time of the shooting that a reasonable officer in

> Pomeroy's position would have understood that what he was doing violated the law.

(App. 14).

Again, the Eighth Circuit's analysis of the second prong of the qualified immunity standard is wholly consistent with the United States Supreme Court's dictates in *Saucier*.

> Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, in those situations the court will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. The same analysis is applicable in excessive force cases, where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.

Saucier, 533 U.S. at 206, 121 S. Ct. at 2158-59.

Although Parks pays lip service to *Saucier*, Parks' arguments actually appear to be in conformity with the Ninth Circuit opinion in *Saucier*, which was resoundingly rejected by the United States Supreme Court. Parks argues that the Eighth Circuit's presumption that Plaintiff may be able to prove that Pomeroy violated Parks' Fourth Amendment rights, establishes unreasonable conduct that prevents the application of qualified immunity on the second step. Parks' argument ignores the distinctive nature of the second step. In *Saucier*, the Ninth Circuit

Court of Appeals held that the qualified immunity analysis is so intertwined with the question whether the officer used excessive force that qualified immunity and constitutional violation should be treated as one question, to be decided by the trier of fact. *Saucier*, 533 U.S. at 197, 203, 121 S. Ct. 2154, 2157. The Supreme Court in rejecting the Ninth Circuit holding, emphasized in *Saucier* that the two questions are not duplicative and must be addressed separately. *Id.* In rejecting the Ninth Circuit's attempted fusion between the two questions, the Supreme Court in *Saucier* stated that the approach cannot be reconciled with *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987). Furthermore,

> The approach the Court of Appeals adopted – to deny summary judgment any time a material issue of fact remains on the excessive force claim – could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.' *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982). If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. *See Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092 (1986) (qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.').

Saucier, 533 U.S. at 202, 121 S. Ct. at 2156, 2157. Therefore, Petitioner improperly attempts to blur the first and second steps in analyzing qualified immunity.

Parks then argues that because Perry Parks' hand was not on the officer's service weapon immediately preceding the shooting of Parks, that Parks did not pose a

deadly threat. Parks argues that such a belief by Pomeroy would be a subjective mistake on Pomeroy's part and not comport with the required objective analysis. Parks ignores that the Eighth Circuit in *Parks* considered this fact in light of an objective standard as to whether an officer confronting the actual situation encountered by Officer Pomeroy could reasonably have a mistaken understanding as to whether a particular amount of force is *legal* in those circumstances. The Eighth Circuit's analysis therefore examined Parks' claim that Parks' hand was not on the gun at the moment of the shooting, and engaged in the analysis required by *Saucier* to examine the specific circumstances confronted by the officer in light of clearly established law. That Parks did not have his hand on the gun immediately preceding the shooting of Parks does not mean that it was a violation of clearly established law for an officer to protect the officer and others by use of deadly force when the officer objectively had information that moments earlier his fellow officer had indicated that the subject had attempted to take away that officer's gun and the officer remained in a continuing struggle with the subject. The cases cited by Pomeroy dictate that an officer doesn't have to wait until a gun is pointed at the officer before the officer is entitled to take action. *See, e.g.*, *Billingsley v. City of Omaha*, 277 F.3d 990 (8th Cir. 2002); *Willingham v. Loughnan*, 321 F.3d 1299 (11th Cir. 2003); *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1998); *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir. 1993).

In *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), the police officer ordered occupants inside the car to raise their hands. When one occupant raised and lowered his hands several times, an officer, believing that the man was reaching for a gun that would place the officers in danger,

shot him once in the head at a distance of approximately 10 feet. The Fifth Circuit determined the shooting, "was reasonable and not excessive." *Id.* at 500. Reversing the denial of summary judgment based on qualified immunity to the individual officers, the Court explained, "Under these circumstances, a reasonable officer could well fear for his safety and that of others nearby." *Id.* at 501.

These cases and the other cases cited in Parks' Briefs establish that, when you examine the totality of the circumstances, even though a subject may have been unarmed at the moment deadly force was utilized, does not mean that the subject did not pose an imminent threat to the lives and safety of the officers and others. A post-*Saucier* decision made the following holding applicable to the case here:

> Indeed, once Hennessey grabbed the barrel of Detective Smith's gun and tried to pry it from his hand, a reasonable officer would infer a substantial possibility that he was fighting for his life. Maybe he could have hoped that Hennessey simply wanted to disarm him, not shoot him, but that would have been a gamble. Under these circumstances, taking the facts alleged in the light most favorable to Hennessey, Detective Smith could have reasonably shot Hennessey **even if he had just pushed Hennessey back a few feet.**

Billington v. Smith, 292 F.3d 1177, 1185 (9th Cir. 2002). (Emphasis added).

Parks complains that the Eighth Circuit should not have relied on the decision of *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998), because *Nelson* was decided three years before *Saucier*. Parks argues that post-*Saucier*,

Nelson would have been decided under qualified immunity's first step, rather than deciding, as the Court in *Nelson* did, that the defendant in *Nelson* was entitled to qualified immunity because the conduct did not violate clearly established law. Such argument by Parks not only ignores the clear language of the *Nelson* decision which held that the officer's actions did not violate clearly established law, but ignores that long before *Saucier* and *Nelson*, the issue of whether the official's conduct violated a constitutional right was the threshold question.

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the inquiry, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789 (1991).

Saucier, 533 U.S. at 201, 121 S. Ct. at 2156.

Consequently, although the two-step qualified immunity analysis was reaffirmed by the United States Supreme Court in *Saucier*, the two-step test had previously been established as the test at least several years before *Nelson*. Moreover, regardless of whether the Eighth Circuit opinion in *Nelson* hinged on the first or second prong of the qualified immunity analysis, the fact of the matter is that the Eighth Circuit panel in *Parks*, in examining the legal principles set forth in *Nelson* and the particular facts of this case, held that Pomeroy did not violate a clearly established constitutional right. Numerous other decisions also support the Court's conclusion that the actions of Pomeroy did not violate clearly established law. For example, as in *Willingham v. Loughnan*,

261 F.3d 1178 (11th Cir. 2001), *vacated and remanded* by 123 S. Ct. 68 (2002), *reinstated* by 321 F.3d 1299 (11th Cir. 2003), *cert. denied* (Oct. 6, 2003), Officer Pomeroy shot an individual whom the officer had reason to believe seconds before had attempted to kill the officer. At the time Willingham was shot, she was standing unarmed in the door to the kitchen where she had just moments before obtained weapons with which she had tried to kill one of the officers by throwing a knife at him and assaulted another by throwing objects at him. Like Willingham, Parks was neither compliant nor yielding to the officers and remained physically engaged in a struggle with Officer Gottstein from whom, moments before, Officer Pomeroy had obtained information which any reasonable officer would rely on, that is, information that a fellow officer's life was in imminent danger because a subject was attempting to take away the fellow officer's gun.[3] *Willingham* importantly recognizes that:

> The principles and goals of the doctrine of qualified immunity are particularly important in cases like this one: Where police officers are confronting an unpredictable and dangerous situation in which split-second decisions can make the difference between life and death.

Id. at 1187.

> From the vantage point of an officer whose life is jeopardized, a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression

[3] The Eighth Circuit has recognized that an officer may use deadly force on reliance on information from other officers. *See Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993).

> and death . . . police officers cannot be expected to delay or to second-guess decisions that may be made in the heat of a dangerous confrontation with a person engaged in violent criminal conduct.

Id. at 1186-87. The Eleventh Circuit therefore held that:

> Under these circumstances – shooting plaintiff, even if she was unarmed at the moment, did constitute excessive force in violation of the Fourth Amendment, the defendants are entitled to qualified immunity.

Id. at 1187.

Even though Parks, like Willingham, did not have his hand on a weapon at the moment he was shot, Pomeroy would be entitled to qualified immunity based on the following factors considered in *Willingham*:

> 1) plaintiff had just attempted to murder one police officer and assault another (here, undisputedly, we have evidence that Officer Gottstein had communicated to Pomeroy and other police officers through his radio mic that was activated during the struggle, that Parks was attempting to take his service weapon);
>
> 2) the subject was not under police control (again, the Court's recitation of facts, that Parks does not dispute, is that there was an ongoing struggle between Parks and the officers); and
>
> 3) the subject was close to a source of weapons (again, it is undisputed that Parks, during the struggle in which the District Court indicates he was on top of Gottstein, was in close proximity to a weapon).

Willingham, 261 F.3d at 1185. Here, Officer Pomeroy was entitled to act on the perception that Parks had attempted to obtain Officer Gottstein's gun and continued to struggle with the officers. *See Anderson v. Russell*, 247 F.3d 125, 131 (4th Cir. 2001) *citing McLenagan v. Karnes*, 27 F.3d 1002, 1007 (4th Cir. 1994) ("We do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him.").

In *Anderson*, 247 F.3d at 130-31, the officer who fired the weapon that shot the plaintiff was held to have reasonably perceived the plaintiff to be armed. Officer Pomeroy also had sound reason to believe that Parks was attempting to get Officer Gottstein's gun based on the statements by Officer Gottstein. "Accordingly, because Russell had sound reason to believe that Anderson was armed, Russell acted reasonably by firing on Anderson as a protective measure before directly observing a deadly weapon." *Id.* at 131. *See also, Milstead v. Kibler*, 91 F. Supp. 2d 895 (W.D. Va. 2000), *aff'd*, 243 F.3d 157 (4th Cir. 2001), *cert. denied* (Oct. 1, 2001); *Boyd v. Baeppler*, 215 F.3d 594, 600 (6th Cir. 2000) ("That the defendants did not see or hear Boyd fire the weapon does not affect whether the police officers, acting reasonably under the circumstances known to them, acted in defense of their own safety and the safety of officers through the use of deadly force.").

The Eighth Circuit accepted Tamara Parks' assertion that she could see Perry Parks' left hand on the floor at the time he was shot and concluded as a matter of law, based on the facts and circumstances confronting the officers, and case law, that qualified immunity applied to bar Parks' claims. Those undisputed facts included:

1) Parks refusing to comply with the officers' orders;

2) During the struggle between Parks and Gottstein, Parks was on top of Gottstein facing the opposite direction;

3) During the struggle, Gottstein felt his duty belt and service weapon being moved and believed that Perry Parks had his hand on Gottstein's weapon;

4) That Gottstein screamed that Parks was trying to take the officer's gun;

5) The radio transmission from the Parks' residence containing the statement by Gottstein screaming, "He's trying to get my weapon! I need help here!";

6) Mrs. Parks did not claim that at no time during the struggle did Mr. Parks have his hand on the gun;

7) Pomeroy saw Parks' hand on the gun and felt Parks hand on the gun earlier.

The Eighth Circuit panel recognized that even though at the threshold stage Plaintiff may be able to prove a constitutional violation, Pomeroy is entitled to qualified immunity, "even if he wrongly, but reasonably, believed his actions were lawful." (App. 14). The Court recognized that there were numerous Fourth Amendment excessive force cases which stand for the proposition that a reasonably objective police officer in Pomeroy's position would have believed that his actions were lawful. (App. 14). The Court of Appeals stated that in light of *Nelson*,

> . . . and other similar precedents, we cannot say that, at the moment of Parks's fatal shooting, Pomeroy reasonably should have known that what he was doing violated Parks's constitutional

> rights. In the present case, even if we assume that Pomeroy could see Parks's left hand on the floor at the moment of the shooting, it cannot be disputed that Gottstein's gun was nevertheless just inches from Parks's hand. As in *Nelson*, the physical struggle between Parks and Gottstein was hostile and intense, the circumstances were extremely volatile and potentially deadly, and the events were evolving rapidly. Therefore, notwithstanding plaintiff's citation of arguably contrary Fourth Amendment cases, we hold, upon *de novo* review, that – given the state of the law at the time and the particular facts of this case – Pomeroy did not violate a *clearly established* constitutional right. "Qualified immunity operates in this case . . . just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force' and to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Saucier v. Katz*, 533 U.S. at 206, 121 S. Ct. 2151 (internal citation omitted).

(App. 15, 16). (Emphasis in original).

Parks next argues that because Parks was shot in the high upper back, the Eighth Circuit decision utilized a subjective standard, as, according to Parks' argument, shooting Parks in the back would be a violation of clearly established law. Again, a reading of the plain language in the *Parks* opinion reveals that the Court utilized an objective test rather than a subjective one. Furthermore, the placement of the shot was clearly found to be irrelevant. This was not a case where Officer Pomeroy alleged that Parks was advancing toward him with a weapon. Here, as in the Eighth Circuit decision of *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir. 1993), "there is no evidence that

requires us to attribute special significance to the fact that Officer Fuhr shot Krueger in the back." *Krueger*, 991 F.2d at 439. Similarly, Officer Pomeroy is not claiming that Parks had been advancing on him when the shots were fired, but rather was utilizing deadly force in response to the objective information he received that Parks was attempting to take Gottstein's gun. Whether the use of force resulted in a shot to Parks' back or front has no relevance to the use of deadly force in this case.

B. The decision below does not conflict with other circuit courts.

The *Parks* decision does not conflict with decisions from other circuit courts and, more importantly, does not conflict with decisions by the United States Supreme Court.

For the proposition that the *Parks* decision conflicts with decisions from other circuit courts, Parks cites the cases of *Cowan v. Breen*, 352 F.3d 756 (2nd Cir. 2003) and *Wilkins v. Scarrott*, 350 F.3d 949 (9th Cir. 2003), *cert. denied* (Oct. 4, 2004). Contrary to *Wilkins*, Pomeroy's entitlement to qualified immunity does not depend on the resolutions of disputed issues of fact in his favor. Accepting Parks' version of the facts demonstrated that Pomeroy's decision to use deadly force to stop Parks was not in violation of clearly established law.

Similarly, the Second Circuit decision of *Cowan* has no relevance to the case at hand. Unlike *Cowan*, Pomeroy has accepted the facts as alleged by Mrs. Parks. In *Cowan*, the Court specifically found that the existence of a fact dispute prevented the Court from proceeding on the issue of qualified immunity:

> Although Breen purports to rely only on the undisputed evidence in demonstrating that there was no constitutional violation of Cooper's rights, his brief on appeal is replete with his own version of the events.

Cowan, 352 F.3d at 762 (quotation omitted).

The *Craighead v. Lee*, 399 F.3d 954 (8th Cir. 2005) and *Flores v. City of Palacios*, 381 F.3d 391 (5th Cir. 2004) cases cited by Parks are inapposite to the present case as neither *Flores* nor *Craighead* set forth principles relevant to the issue here of determining whether the law, in the circumstances faced by Officer Pomeroy, was clearly established. As *Saucier* held, "this inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 194, 121 S. Ct. 2156.

Furthermore, this is not a situation where guidance and precedent are lacking to the circuit courts. The Supreme Court has issued guiding precedents on the issue of the application of the qualified immunity standard in several cases, including *Saucier*, 533 U.S. at 197, 203, 121 S. Ct. 2151 (2001); *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987); and *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982), in addition to other Supreme Court cases, and the Eighth Circuit's analysis of the second step of the qualified immunity analysis is not in conflict with the rule of law set forth in those cases.

CONCLUSION

The Eighth Circuit properly held that qualified immunity bars Parks' claim, as a reasonable officer could have believed that the use of deadly force was not in violation of clearly established law during this brief and intense struggle in which Officer Pomeroy reasonably believed that Parks attempted to take control of Officer Gottstein's gun. Furthermore, *Saucier* holds that qualified immunity applies even if Officer Pomeroy had a mistaken understanding as to the amount of force that was legal under the circumstances of this tense and rapidly evolving struggle in which his fellow officer had indicated that Parks was attempting to take away his service weapon.

Therefore, Officer Pomeroy respectfully requests that Plaintiff's Petition for Writ of Certiorari be denied. Parks does not satisfy any of the criteria for exercise of the Supreme Court's discretionary review.

DATED: April 21, 2005 Respectfully submitted,

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